A

MBF FINANCE BHD

v.

MURUGES KUPPUSAMY

B

HIGH COURT MALAYA, KUALA LUMPUR
VT SINGHAM J
[CIVIL SUIT NO: 22NCVC-381-2011]
7 MAY 2012

C ***BANKING:*** *Banks and banking business - Loan agreement - Default in repayment - Claim for interest and late payment interest - Delay in commencing foreclosure proceedings - Whether delay caused prejudice to defendant - Whether claim unfair and improper*

D ***LAND LAW:*** *Sale of land - Auction - Delay in commencing foreclosure proceedings - Accumulated interest charges - Whether plaintiff mitigated losses*

Pursuant to a loan agreement and the deed of assignment dated 10 October 1996, the plaintiff had agreed to grant a loan facility E amounting to RM157,900 to the defendant. However, the defendant had failed and neglected to pay the instalment. The plaintiff then commenced a foreclosure proceedings on the security which was auctioned on 20 August 2007 for the sum of RM78,000. The amount from the proceeds was settled and F received by the plaintiff. As at 30 September 2010, the amount which was amended as still owing to the plaintiff was RM496,650.32 which was still due with interest and late payment interest accrued. Therefore, the plaintiff claimed judgment against the defendant for the sum of RM496,650.32 as at 30 September G 2010 with interest. The defendant contended that the plaintiff's cause of action was pre-matured and referred to cl. 11.02(b) of the loan agreement which required the plaintiff to take the necessary action in respect of the property before commencing any civil action against the defendant. The questions of law which H were raised for determination under O. 14A of the Rules of the High Court 1980 ('RHC') read with O. 33 of the RHC, *inter alia*, were (i) whether there was an unreasonable delay on the part of the plaintiff to proceed with the auction of the property since the cause of action accrued on 15 November 2001; and (ii) subject I to the answer to question (i), whether the defendant was liable to bear the additional interest and charges accumulated and included in the claim.

Held (allowing plaintiff's claim in part):

(1) The circumstances of the instant case did not justify the claim for interest on monthly rest and late payment interest and other charges to be imposed against the defendant. The plaintiff had indeed admitted in the affidavit that there was a delay and that the delay was due to the merger of the plaintiff. (para 15)

(2) The merger of the plaintiff bank and the delay that would be caused as a result of the merger was not foreseeable at the time of the execution of the loan agreement. Hence, the reason for the delay in proceeding with the auction was beyond the contemplation of the parties at the time of the execution of the loan agreement. Therefore, the defendant ought not to be punished or penalised or burdened for the interest and the late payment interest during the said period of the delay which was caused by the plaintiff. (para 16)

(3) It is a cardinal principle of law that when a litigant seeks the intervention of the court, in a matter that affects his claim or right, he or she must do so timeously and expeditiously. In the present case, there was certainly a prolonged delay by the plaintiff in proceeding with the auction. There was no doubt that the delay had caused prejudice, injustice and unreasonable burden to the defendant due to the accumulated interest and late payment interest which the plaintiff had claimed as penalty interest in respect of the late payment interest. Therefore, the defendant must be adequately compensated by deducting the interest and the late payment interest and the charges for the period which is about five years. (paras 17 & 21)

(4) The plaintiff must mitigate the loss as there was a duty on the part of the plaintiff to take all reasonable steps to reduce the extent of loss suffered by the plaintiff. The defendant had established that the plaintiff had acted unfairly and unreasonably and that the claim for the interest and the late payment interest during the period of the delay did not arise naturally or in the usual course of things or such as was reasonably or supposedly to have been in the contemplation of the parties at the time they had entered into the said loan agreement *Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors;* refd. (paras 19 & 25)

(5) In the circumstances, it was proper for the court to interfere with the claim for the interest on the monthly rest and the late payment interest imposed upon the defendant. The claim for the interest and the late payment interest was unfair and improper. The fact that the plaintiff was at liberty to proceed with the auction within 12 years under the Limitation Act 1953 to enforce the statutory remedy did not mean the plaintiff could sleep on its right and wake up at their convenience and leisure and proceed with the auction later, particularly when the delay would obviously cause unfairness, prejudice and burden on the defendant. As the plaintiff had slept on their right to proceed with the auction timeously, they must be prepared to forego the interest and the late payment interest during the said period. (para 26)

Case(s) referred to:

Bank Bumiputra (M) Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC ***(refd)***

Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***

Credit Corp (M) Bhd v. Bulan Sabit Sdn Bhd & Ors [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444 HC ***(refd)***

Cuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd [1971] Ch 949 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Malaysia Building Society Bhd v. Lim Kheng Kim & Ors [1988] 2 CLJ 675; [1988] 1 CLJ (Rep) 770 HC ***(refd)***

Mc Hugh v. Union Bank of Canada [1913] AC 299 ***(refd)***

People Realty Sdn Bhd v. Hong Leong Bank Bhd & Anor [2008] 1 CLJ 73 CA ***(refd)***

Standard Chartered Bank v. Walker [1982] 3 All ER 938 ***(refd)***

Tosrin Jarvanthi, Re: Ex P; Equity Finance Corp Bhd [1989] 2 CLJ 1057; [1989] 2 CLJ (Rep) 587 HC ***(refd)***

United Overseas Bank (Malaysia) Bhd v. Andrew Lee Siew Ling [2012] 3 CLJ 708 CA ***(refd)***

Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor [1998] 1 LNS 363 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 8(2A)

Companies Act 1965, s. 291

Rules of the High Court 1980, O. 14A, O. 33

For the plaintiff - Pramjit Singh; M/s KK Lim & Assocs
For the defendant - MR Kumar; M/s Kumar & Assocs

Reported by Emm Zehra

JUDGMENT

VT Singham J:

[1] By the amended statement of claim dated 28 August 2002 (encl. 18), the plaintiff has pleaded that:

(a) Pursuant to the loan agreement and the deed of assignment dated 10.10.1996 between the plaintiff and defendant, the plaintiff had agreed to grant loan facility amounting to RM157,900.00 to the defendant based on the terms and conditions as contained in the said loan agreement and the deed of assignment.

(b) The loan facility was granted to the defendant to enable the defendant to purchase an office unit in the Complex known as No. 15 Level 12 Block A3 Commerce Square, Pusat Dagang Setia Jaya in land held under title HS(D) 63219 P.T.12207 at Mukim Damansara, District of Petaling, State of Selangor (hereinafter referred to as the 'property').

(c) By letter dated 19.10.2001, the plaintiff through their solicitors Messrs Darshan, Chong & Co demanded the plaintiff to pay the instalment within 7 days but the defendant had failed and neglected to pay the said amount or any part of the amount despite several request having been made by the plaintiff.

(d) Subsequently, the plaintiff issued a further Notice dated 15.11.2001 to the defendant to settle the total balance due on the loan as at 29.9.2001 with interest on the said amount. By the said letter dated 15.11.2001, the plaintiff through the solicitors reminded the plaintiff to repay the total debt amounting to RM227,135.63 as at 29.9.2001 with interest thereon at the rate of 9.45% per annum and penalty interest of 1% per annum on the entire outstanding sum calculated from 30.9.2002 till the date of full settlement but the defendant had failed and neglected to pay the said amount or any part thereof.

A (e) The plaintiff then commenced foreclosure proceedings on the security and it was auctioned for the sum of RM78,000.00 on 20.8.2007. The amount obtained from the proceeds of the auction was settled and received by the plaintiff. As at 30.9.2010, the amount which was amended as still owing to the plaintiff was RM496,650.32 which is still due with interest and late payment interest accrued.

B

(f) Therefore, the plaintiff claims judgment against the defendant for:

C (a) RM496,650.32 as at 30.9.2010.

(b) Interest at the rate of 9.45% p.a. (including 2% p.a on the loan and updated 7.45% p.a.) calculated on monthly basis and varied from time to time **from 30.9.2001 until full satisfaction.** (emphasis added)

D (c) late payment interest at 1.0% p.a. at the rate based on the loan calculated **from 30.9.2001 until the date of full settlement.** (emphasis added).

(d) costs.

E **[2]** On the other hand, by the statement of defence dated 3 June 2002 (encl. 5), the defendant has contended that the plaintiff's cause of action is pre-mature. The defendant had referred to cl. 11.02(b) of the loan agreement dated 10 October 1996 which had required the plaintiff to take the necessary action F in respect of the property before commencing any civil action against the defendant as filed in the present case.

[3] On 27 July 2011, when this case came up for case management, the parties had consented for this case to be G determined without a full trial under O. 14A of the Rules of the High Court 1980 (RHC 1980). As agreed between the parties, the questions of law which was framed under O. 14A of the RHC 1980 is:

H (1) In the light of clauses 11.02, 11.03 and 11.04 of the loan agreement dated 10.10.1996, is the suit filed by the plaintiff herein premature in law and bereft of any cause of action in view of the fact that the plaintiff had commenced the instant suit against the defendant without first disposing off the property in issue by way of public auction?

I (2) If the answer to Question No. 1 is affirmative, has there been a breach on the part of the plaintiff?

(3) Subject to Question No. 1 and Question No. 2, was there an unreasonable delay on the part of the plaintiff to proceed to auction the property which was assigned by the defendant, as the cause of action had accrued on 15.11.2001?; and

(4) Subject to the answer to Question No. 3 above, is the defendant liable to bear the additional interest and charges accumulated and included on the claim?

O. 14A of the RHC 1980 provides:

1. Determination of questions of law or construction. (O. 14A r. 1)

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19, or any other provision of these rules.

(2) Manner in which applications under rule 1 may be made (O. 14A r. 2)

An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.

[4] However, on 20 December 2011, both the parties had informed this court that the parties have reached an agreement to proceed only with questions No. 3 and 4 for this court to determine the same under O. 14A to be read with O. 33 of the RHC 1980 and had applied to withdraw Questions No. 1 and 2. Accordingly, Questions No. 1 and 2 was struck out and Questions No. 3 and 4 was recorded as Questions No. 1 and 2. The two questions for the determination by this court under O. 14A to be read with O. 33 of the RHC 1980 and to finally determine the entire claim of this suit is, as follows:

(a) Question No. 1:

Was there an unreasonable delay on the part of the plaintiff to proceed to auction the property which was assigned by the defendant, as the cause of action had accrued on 15.11.2001?; and

(b) Question No. 2:

Subject to answer to question 1 above, is the defendant liable to bear the additional interest and charges accumulated and included in the claim?

O. 33 of the RHC 1980 provides:

1. Mode of trial. (O. 33 r. 1)

Subject to the provisions of these rules, a cause or matter, or any question or issue arising therein, may be tried before:

(a) a Judge; or

(b) a Judge with the assistance of assessors; or

(c) the Registrar.

2. Time, etc., of trial of questions or issues. (O. 33 r. 2)

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

3. Determining the mode of trial. (O. 33 r. 3)

(1) In every action begun by writ, an order made on the summons for directions shall determine the mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.

(2) In any such action different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.

(3) The references in this Order to the summons for directions include references to any summons or application to which, under any of these rules, Order 25, rules 2 to 7 are to apply, with or without modifications.

4. Trial with assistance of assessors. (O. 33 r. 4)

A trial of a cause or matter with the assistance of assessors shall take place in such manner and on such terms as the Court may direct.

5. Dismissal of action, etc. after decision of preliminary issue. (O. 33 r. 5)

If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[5] Learned counsel for the plaintiff has submitted *inter alia*, and briefly, as follows:

(a) the remedies available to the lender are by way of civil action and in equity which can be done concurrently at one time;

(b) clauses 11.02, 11.03 and 11.04 of the loan agreement dated 10 October 1996 creates a right to the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall;

(c) there is no requirement for the lender to dispose or sell off the said property/charge in recovering the debt in the event of the borrower's default in payment;

A (d) the plaintiff is entitled to proceed with the civil action without commencing the foreclosure proceedings;

(e) The plaintiff did not act *mala fide* in the disposal of the property as the Limitation Act 1953 allows 12 years for the
B chargee to commence an action for the disposal of the property;

(f) This court should answer Question No. 1 in the negative and Question No. 2 in the positive.

C Clause 11.02, 11.03 and 11.04 of the Loan Agreement dated 10.10.1996 provides:

SECTION 11.02 RIGHT OF LENDER ON BORROWER'S DEFAULT

D If the Borrower shall commit a default pursuant to the terms herein or if any of the events stipulated in Section 11.01 hereof shall happen and which if capable of remedy is not remedied within a period of seven (7) days from the date of notice by the Lender requesting remedy of the
E same, or is remedied within the time specifically stipulated therefor (if any) in respect of the event in question, all Advances or the Loan, interest thereon and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the
F Lender will be entitled without further notice to the Borrower:

(a) terminate the licence hereinbefore referred to and to enter upon and take possession of the Property or any part thereof and to deal with all the rights and interest of the
G Lender in relation to the Property or otherwise in all respect as the person absolutely and beneficially entitled thereto;

(b) let or lease the Property or any part thereof for such tenancy or term of years at such rent and upon such terms and
H conditions as the Lender shall in its absolute discretion think fit;

(c) sell, transfer or assign the Property or any part thereof as the beneficial owner thereof at such price and in such manner and subject to such conditions as the Lender shall
I in its absolute discretion think fit free from any interest of the Borrower hereunder or otherwise irrespective of whether

the Charge on the Property has been registered in favour of the Lender and no assignee or purchaser of the Lender shall be required or concerned to see whether any such default has in fact been made by the Borrower or any other occasion has arisen for the exercise of the Lender's rights and power of assignment or of the sale hereunder.

And the Borrower hereby expressly agrees covenants and undertakes to do and to execute all acts deeds instruments and things which the Lender require or stipulate for the purposes of effecting or completing anything and or any transaction mentioned in this section.

SECTION 11.03 PROCEEDS OF THE SALE

All monies received by the Lender from any proceedings instituted or step taken under any of the Security Documents shall be applied by the Lender:

FIRSTLY in payment of all costs charges and expenses incurred and payments made by the Lender under the provisions of all or any of the Security Documents.

SECONDLY in or towards payment to the Lender of all interest then accrued and remaining unpaid in respect of the loan, or the balance thereof for the time owing.

THIRDLY in or towards payment to the Lender of the principal sum due and remaining unpaid under the loan.

FOURTHLY in or towards payment to the lender of all other moneys due and remaining unpaid under any or all of the Security Documents.

FIFTHLY any surplus shall be paid to such persons entitled thereto.

PROVIDED ALWAYS THAT if the Lender shall be of the opinion that the security may be prove deficient payments may be made to the Lender on account of principal before interest but such alteration in the order payment shall not prejudice the right of the Lender to receive the full amount to which it would have be entitled of the primary order had been observed or any lesser amount which the sum ultimately realized from the security may be sufficient to pay.

SECTION 11.04 DEFICIENCY IN PROCEEDS OF SALE

If the amount realized by the Lender pursuant to the proceedings referred to in Section 11.03 hereof after the deductions thereof is less than amount due and payable to the Lender and whether at such sale the Lender is the purchaser or otherwise the Borrower shall pay to the Lender the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the prescribe rate herein.

[6] In support of the plaintiff's case, learned counsel for the plaintiff has referred to the following cases:

1. *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81;
2. *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36;
3. *People Realty Sdn Bhd v. Hong Leong Bank Bhd & Anor* [2008] 1 CLJ 73.

[7] On the other hand, learned counsel for the defendant has submitted, *inter alia*, and briefly, as follows:

(a) The plaintiff's present action is premature on the ground that the plaintiff ought to exhaust its remedy *in rem*, before commencing an action *in personam* against the defendant;

(b) The right to proceed concurrently against both the borrower as well against the security was allowed by courts only by reason of it being stipulated in the contract between the parties;

(c) The plaintiff cannot disregard the clear wording of the terms of the contract and adopt a position which is clearly contrary to the terms stipulated in the contract which enumerated extensively the steps to be adopted by one party upon the breach by the other party to the contract;

(d) The plaintiff had misconceived its discretion and disregarded the cls. 11.02, 11.03 and 11.04 of the loan agreement dated 10 October 1996 when the plaintiff had unreasonably delayed the auctioning of the property. As a result, the defendant is burdened with the accumulation of interest and other charges which is still ongoing. The plaintiff had failed to discharge his duty of care in good faith;

(e) The plaintiff owes the duty of care under the law to ensure the property is promptly disposed;

(f) Question No. 1 should be answered in the affirmative, and Question No. 2 ought to be answered in the negative.

[8] In support of the defendant's argument, the learned counsel for the defendant has referred to the following cases:

1. *Bank Bumiputra (M) Bhd v. Esah Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41;
2. *Tosrin Jarvanthi, Re: Ex P; Equity Finance Corp Bhd* [1989] 2 CLJ 1057; [1989] 2 CLJ (Rep) 587;
3. *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 2 CLJ 675; [1988] 1 CLJ (Rep) 770;
4. *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81;
5. *Cuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd* [1971] Ch 949;
6. *Standard Chartered Bank v. Walker* [1982] 3 ALL ER 938

Decision

[9] On going through the amended statement of claim (encl. 8), the statement of defence (encl. 5), the *Ikatan Dokumen-Dokumen* (encl. 17) which includes the documents which the parties had agreed to be considered to answer the two questions of law, the *afidavit pembetulan* of the plaintiff affirmed by the plaintiff's solicitor on 19 November 2010, the *afidavit* of the plaintiff affirmed on 26 January 2012 and the *afidavit jawapan* of the defendant affirmed on 8 February 2012, the said questions of law pursuant to O. 14A to be read with O. 33 of the Rules of the High Court 1980 and the submissions with the authorities referred to by both the parties and the research carried out by this court, the decision of this court is:

[10] In order to arrive at a just decision, it is important to refer briefly to the background facts of the present case in a chronological order which is relevant to determine the two questions of law. For the purpose of this judgment, the plaintiff will also be referred to as the bank:

A

a. By the original statement of claim dated 21.2.2002 filed on 21.2.2002 at the Sessions Court Kuala Lumpur *vide* Summons No. 9-52-4175-2002, the reliefs and amount claimed by the plaintiff was:

B

(a) Jumlah sebanyak RM227,135.63 setakat 29.9.2001

(b) Faedah pada 9.45 setahun (2.0% setahun atas kadar asas pinjaman pada masakini 7.45% setahun) atas kiraan bulanan dan berubah dari masa ke semasa yang difikir munasabah dari 30.9.2001 sehingga tarikh penyelesaian penuh;

C

(c) Faedah lewat pada kadar 1.0% setahun di atas kadar asas pinjaman dikira dari 30.9.2001 sehingga tarikh penyelesaian penuh;

D

(d) Kos tindakan ini;

(e) Selanjutnya relif lain yang difikirkan suai dan manfaat oleh Mahkamah Yang Mulia ini.

E

b. The Statement of claim dated 21.2.2002 was amended pursuant to an order dated 28.8.2002 by the Sessions Court Kuala Lumpur based on the plaintiff's application dated 26.7.2002.

F

c. On 28.5.2003, summary judgment was entered against the defendant pursuant to the Notice of Application dated 17.2.2003 (by the Sessions Court Kuala Lumpur) under O. 26A of the Subordinate Courts Rule 1980 based on the amended statement of claim dated 28.8.2002 which had amended paragraph 3 of the Statement of Claim (Enclosure 8) which reads:

G

> Setakat 29.9.2001 jumlah pinjaman yang kena dibayar oleh defendan berjumlah RM227,135.63 yang masih belum diselesaikan dengan faedah terakru dikira dari 30.9.2001 sehingga tarikh penyelesaian penuh dan dimana butir-butir selanjutnya adalah dalam pengetahuan defendan sepenuhnya.

H

d. However, upon an appeal by the defendant to the High Court, the summary judgment was set aside on 7.1.2004 and the plaintiff's claim was remitted to the Sessions Court for trial.

I

e. Subsequently, the statement of claim was reamended pursuant to an order of the Sessions Court dated 12.11.2010 which has included *inter alia* paragraphs 8, 9 and prayer (a) which is as follows:

8. Plaintif dalam pada itu telah memulakan satu tindakan lelongan awam terhadap hartanah tersebut dan ianya telah dibida pada harga RM78,000.00 pada 20.8.2007. Baki harga lelongan tersebut telah dijelaskan dan diterima oleh plaintif pada 20.11.2007. Dan setakat tarikh 30.9.2010, defendan masih berhutang dengan plaintif jumlah sebanyak RM496,650.32.

9. Setakat 30.9.2010 jumlah pinjaman yang kena dibayar oleh defendan berjumlah RM496,650.32 yang masih belum diselesaikan dengan faedah terakru dikira dari 30.9.2001 sehingga penyelesaian penuh dan dimana butir-butir selanjutnya adalah di dalam pengetahuan defendan sepenuhnya.

10. Plaintif akan merujuk kepada dokumen-dokumen yang berkaitan sewaktu perbicaraan tindakan ini. Oleh kerana itu, plaintif memohon penghakiman terhadap defendan untuk:

a. Jumlah sebanyak RM469,650.32 setakat 30.9.2010;

b. Faedah pada kadar 9.45% setahun (termasuk 2.0% setahun atas kadar pinjaman pada masa kini 7.45% setahun) atas kiraan bulanan dan berubah dari masa ke semasa yang difikir munasabah dari 30.9.2001 sehingga tarikh penyelesaian penuh;

c. Faedah lewat pada kadar 1.0% setahun diatas kadar asas pinjaman dikira dari 30.9.2001 sehingga tarikh penyelesaian penuh;

d. Kos tindakan ini; dan

e. Selanjutnya relif lain yang difikirkan suai dan manfaat oleh Mahkamah Yang Mulia ini.

[11] As stated above, this case was originally filed at the Sessions Court Kuala Lumpur *vide* Summon No. 9-52-2175-2002 which was transferred to the High Court pursuant to the order of the High Court dated 6 January 2011 *vide* Originating Summons No. 24NCVC-572-2010. By the letter dated 27 April 2011, the Registrar of the Lower Court, Kuala Lumpur had

A transferred the original file of the Sessions Court No. 9-52-2175-2002 to the High Court, Kuala Lumpur which was received by the Managing Judge Unit of the Civil Division, High Court, on 12 May 2011.

B **[12]** As to the plaintiff's claim against the defendant as stated in the affidavit affirmed on 26 January 2012 by the plaintiff's executive (encl. 23), the property was sold by public auction on 20 August 2007 for RM78,000 (see exh. NH2).

C **[13]** The reasons advanced by the plaintiff for not having taken action till 2006 to auction the property was:

a. the deponent of the affidavit, the Executive of the plaintiff had been informed by the plaintiff's management that between the year 2002 till 2005, there was the merger
D between the plaintiff MBf Finance Berhad (which had changed its name to AMFinance in 2002) with Arab Malaysian Finance Berhad. The vesting order dated 21.5.2002 (Exhibit NH3) was attached to the affidavit.

b. Consequently, there was transfer of officers and restructuring
E of the plaintiff's management which had caused numerous accounts which were not regularised or handled until they were able to process and reregularise all the accounts which was in arrears and which was not in proper order. (tidak ada tindakan susulan).

F **[14]** By the affidavit jawapan affirmed on 8 February 2012, the defendant has stated that:

a. 4 years is too long to complete the merger.

G b. The subject of the merger is an internal matter which is beyond the control or contemplation of the defendant and should not prejudice the defendant which had resulted in a burden to the defendant.

H c. The plaintiff has imposed various interest to the defendant's accounts (including late payment interest during the 4 years although it was the plaintiff who had failed to auction the property and reduce the debt during the said time.

I d. The plaintiff had commenced the civil action against the defendant on 28.2.2002 pursuant to the breach of the loan agreement based on the Notice of Demand dated 19.10.2001 and had proceeded with the auction only on 27.11.2006. ie, about five years after the right to auction had existed.

[15] In the present case, upon considering the materials and the factual matrix before this court, this court is of the considered view that circumstances of the present case did not justify the claim for interest on monthly rest and late payment interest and other chargers to be imposed against the defendant as claimed by the plaintiff during the period of the said delay although the claim is based upon the terms of the loan agreement and the deed of assignment dated 10 October 1996. Indeed, the plaintiff has admitted in the affidavit (encl. 35) that first, there was a delay and secondly, the delay was due to the merger of the plaintiff. It is important to reiterate at this stage that the decision of this court is decided based on the amended statement of claim, the statement of defence, the documents as included in the Ikatan Dokumen-Dokumen (encl. 17) the *afidavit pembetulan* affirmed by the plaintiff's solicitor on 19 November 2010, the affidavits affirmed on 26 January 2012 on behalf of the plaintiff and the *afidavit jawapan* of the defendant affirmed on 8 February 2012 and this was agreed by the parties.

[16] The merger of the plaintiff bank was made on 21 May 2002 by the order of the High Court dated 21 May 2002 in Originating Summons No: D8-24-111-2002. Surely, the merger of the plaintiff bank and the delay that will be caused as a result of the merger was not foreseeable at the time of the execution of the loan agreement that the defendant would also be liable to pay the additional interest and late payment interest during the period of the indefinite delay caused by the plaintiff in proceeding with the auction which may arguably have fetched a true or fair market value of the property if the public auction had proceeded much earlier or within a reasonable time from the expiry of the date stipulated in the notice of demand dated 15 November 2001. (see *Mc Hugh v. Union Bank of Canada* [1913] AC 299, *Cuckmere Brick Co Ltd & Anor v. Mutual Finance Ltd* [1971] Ch 949 at pp. 966 & 967, *Standard Chartered Bank v. Walker* [1982] 3 All ER 938 at p. 942). Accordingly, the reason for the delay in proceeding with the auction was beyond the contemplation of the parties at the time of the execution of the loan agreement on 10 October 1996. Therefore, the defendant ought not to be punished or penalised or burden for the interest and the late payment interest during the said period of the delay which was caused by the plaintiff and the defendant has nothing whatsoever to do with the internal affairs of the plaintiff.

[17] It is important to note that at the time when the Summons No: 9-52-2175-2002 was filed at the Sessions Court on 21 February 2002, the claim was for only RM227,135.63. However, the claim was reamended to RM496,650.32 on the application of the plaintiff by the Sessions Court on 12 November 2010 which had included the accrued interest on the monthly rest and the late payment interest during the period of the said delay. The proceeds obtained from the sale through the public auction on 20 August 2007, being RM78,000 to settle the outstanding amount due was insufficient and pursuant to cl. 11.04 of the loan agreement, the plaintiff was entitled to claim the difference between the amount due and the amount so realised from the proceeds of the sale of the property. This court finds, there is certainly a prolong delay on the plaintiff's part in proceeding with the auction and there is no doubt that the delay had caused prejudice, injustice and unreasonable burden to the defendant due to the accumulated interest and late payment interest which the plaintiff has claimed as penalty interest in respect of the late payment interest. The defendant, therefore, must be compensated adequately by deducting the interest and the late payment interest and the chargers for the said period which is about five years.

[18] Inordinate and contumelious delay and ordinary delay on the part of the plaintiff must be distinguished. Ordinary delay to recover proceeds obtained in a judicial sale arising out of a foreclosure proceeding may arguably be acceptable as being part of the legal process provided the plaintiff had proceeded with the auction timeously and expeditiously as the remedy was available to the plaintiff as early as 2001. In fact, when the defendant had failed to repay the sum demanded with the interest within the prescribe period as contained in the notice of demand dated 19 January 2001 and 15 November 2001, the defendant shall be deemed to have committed breach under the terms of the loan agreement and the plaintiff ought to have proceeded to enforce the security and proceeded with the auction without any unreasonable delay. (see cl. 10 of the loan agreement dated 10 October 1996). On the other hand, in some cases, as stated above, the completion of the process of an auction is delayed particularly, when the auction is aborted due to having no bidders and under those circumstances, the plaintiff should not be held responsible for the delay. In the present case, the auction was aborted on 27 November 2006, 15 January 2007, 12 February

2007, 7 May 2007, 11 June 2007 and 23 July 2007 when the auction was finally completed and the property sold on 20 August 2007. However, as in the present case, where there is an inordinate delay on the part of the plaintiff and the reasons advanced on the plaintiff's behalf is certainly not acceptable which had resulted in prejudice and unfairness to the defendant. The delay and the reasons for the delay was not foreseeable and outside the contemplation of the parties in particular, the defendant, at the time when the loan agreement was executed.

[19] Be that as it may, this court has taken into consideration that the terms of the loan agreement between the parties entitled the plaintiff to claim for the interest and the late payment interest for the period where the defendant had defaulted repayment of the loan. However, this court must take into consideration that while the plaintiff is entitled to claim for the interest and the late payment interest in accordance with the terms of the loan agreement, the factual matrix in the present case where the plaintiff had not acted fairly and reasonably in proceeding with the auction timeously, did not justify the plaintiff to claim for the interest and the late payment interest due to the sluggish fashion in which the auction had proceeded and the failure to mitigate the loss. It is important to reiterate that in so far as the period of delay which was due to the auction having been aborted, there would be no deduction during that period for the interest and the late payment interest after the date of the first auction on 29 November 2006 as that delay was part of the legal process.

[20] This court is satisfied that the plaintiff had not taken reasonable steps timeously and expeditiously to proceed with the auction in order to mitigate the unfairness to the defendant so as not to overburden the defendant in terms of the interest and the late payment interest which had resulted in additional burden to the defendant where the same could have been avoided if the plaintiff had mitigated the loss. In fact, pursuant to cl. 11.02(b) of the loan agreement dated 10 October 1996, the plaintiff had 'the absolute right to let or lease the property or any part thereof for such tenancy or terms or years at such rent and upon such terms and conditions as the plaintiff shall in its absolute discretion think fit'. Further, the defendant had *inter alia*, 'agreed and undertook to do and execute such deeds and instruments which the plaintiff require or stipulate for the purpose of effecting or completing anything and or any transaction' mentioned in the said clause but the plaintiff did not enforce the terms available to them immediately

A after the breach had occurred. As stated above, this is a case of the plaintiff having slept on its rights by not taking any positive steps to reduce the claim or mitigate the loss due by the defendant for which the plaintiff must be prepared to accept the reduction in the claim, namely, less the interest accrued and the B late payment interest accrued during the said period of the delay. The plaintiff being a secured creditor by delaying the legal process in realising the security and by not enforcing the remedy and proceeding with the auction timeously had acted unfairly by continuing to charge interest for the outstanding amount.

C

[21] It is a cardinal principle of law that when a litigant seeks the intervention of the court, in a matter that affects his claim or right, he or she must do so timeously and expeditiously *(vigilantibus, non dormientibous, jura subveniunt)*. Even in cases where the right is D exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant and if it is raised as an issue, the burden is upon the litigant who had delayed to render a satisfactory explanation for the delay. However, whether the explanation in a given case is satisfactory or reasonable depends upon the facts and the E surrounding circumstances of each case. In the present case, the delay and the reasons for the delay is unreasonable (see *Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor* [1998] 1 LNS 363; [1999] 5 MLJ 180 at p. 190, *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223 at p. 229 F where the principles enunciated in that cases can readily be applied to the factual matrix and the delay in the present case although the application and facts in the two cases are distinguishable).

G i. In *Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127, after the repossession of the equipment on 27.11.1984, the plaintiff had sued the third defendant, a guarantor to a leasing agreement for 35 remaining instalments unpaid, interest chargers on those unpaid amount up to the date of the sale which took place only on 27.3.1986.

H ii. The plaintiff filed an application for summary judgment under O. 14 of the RHC 1980. The Senior Assistant Registrar granted conditional leave to the third defendant to defend. The third defendant appealed to the High Court, contending that unconditional leave ought to have been granted.

I iii. In that case, liability was not disputed and the question was one of quantum. The High Court allowed the third defendant's appeal from the decision of the Senior Assistant

Registrar and gave unconditional leave to defend. The High Court had also ordered costs of the appeal and the application for the summary judgement before the Senior Assistant Registrar to be taxed and paid by the plaintiff to the third defendant in any event.

Shanker J (later JCA) said at p. 128

The long delay between the date of repossession and the date of sale did raise a triable issue as to whether the plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so.

iv. The plaintiff's appeal to the Supreme Court *vide* Appeal No. 73 of 1988 was dismissed on 10.4.1989 (Coram: Abdul Hamid LP, Mohamed Azmi, Harun Hashim SCJJ).

[22] By analogy, the legal principle that can be deduced in *Credit Corp (M) Bhd v. Bulan Sabit Sdn Bhd & Ors* [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444, and applied to the factual matrix in the present case, is that, the plaintiff must mitigate the loss. By the long delay between the date of repossession of the equipment on 27 November 1984 and the date of the sale on 27 March 1986, it was found that the plaintiff had failed to mitigate the loss and it was held that they must show that they did so.

[23] By further analogy, it is relevant to consider the introduction of sub-s. (2A) into s. 8 of the Bankruptcy Act 1967 on 17 July 1992 where a secured creditor is not entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months of the date of the receiving order. This provision also applies to the debt of a wound up company by virtue of s. 291 of the Companies Act 1965. The rational of this limitation which prevent a secured creditor from claiming interest after the period of six months from the date of the receiving order or the winding up order is, if the secured creditor does not realise the security within six months from the date of the said orders and if the secured creditors delay in realising the security and continues to charge interest on the debt owed to him, there is every possibility that the value of the security when realised will become insufficient to meet the repayment of the outstanding amount due to the secured creditor. Further, where the secured creditor delays in realising the security,

and continues to charge interest on the amount due to him, that delay may cause unfairness to unsecured creditors as there is higher probability that there will be no balance left over from the proceeds of the realisation to go into proof of assets to be shared by unsecured creditors. It is for the purpose of mitigating that unfairness to the unsecured creditors and the debtors that sub-s. (2A) was introduced into s. 8 of the Bankruptcy Act 1967. (see *United Overseas Bank (Malaysia) Bhd v. Andrew Lee Siew Ling* [2012] 3 CLJ 708 (Civil Appeal No. J-02(IM)-2768-2009) (Unreported) [Coram: Jefferey Tan Kok Hua (JCA) (now FCJ), Zaharah Ibrahim (JCA), Linton Albert (JCA)].

[24] Be that as it may, in the present case, the main contention of the plaintiff is that, had the auction been proceeded diligently and as a prudent banker or financial institution after the breach of the terms of the loan agreement dated 10 October 1996 and upon the expiry of the second notice of demand dated 15 November 2001, that is after the foreclosure proceeding was filed, the possibility of the property having obtained a true or fair market value of the sale of the property cannot be ruled out. In fact, by the last paragraph of the notice of demand dated 15 November 2001, the plaintiff through their solicitors has expressly given notice to the defendant by stating that unless the defendant settles the total balance outstanding sum of RM227,135.63 as at 29 September 2001 within one month from the date thereof, an order for sale would be instituted without further reference. In fact, cl. 11.04 of the loan agreement states that "if the amount realized by the plaintiff pursuant to the sale of the property is less than the amount due and payable to the plaintiff, the defendant shall pay to the plaintiff the difference between the amount due and the amount so realized and until payment and also pay interest on such balance at the prescribe rate herein". Accordingly, this court is of the considered view that cl. 11.03 read with cl. 11.04 of the loan agreement would envisage that the plaintiff proceed with the foreclosure proceeding and the auction timeously and expeditiously so that the difference in the amount between the proceeds of the sale and the balance due after deduction of the proceeds of the sale would not be a burden to the defendant. Based on the factual matrix in the present case, this court finds that the plaintiff had not acted fairly and diligently when the auction proceeded after a prolong delay of about five years from the time the balance outstanding sum of

RM227,135.63 became due as at 29 September 2001. On the factual matrix of the present case, it would be manifestly unjust to allow the plaintiff to claim for the interest and the late payment interest during the said period of the delay. Notion of unconscionability could be applied to prevent the plaintiff who is unconscionable for the unreasonable delay brought about, by its own conduct from reaping the fruits of that unreasonable conduct.

[25] As stated above, there is a duty on the part of the plaintiff to take all reasonable steps to reduce the extent of loss suffered by the plaintiff, in the present case, the interest and the late payment interest as a result of the breach of the contract. Rightfully, the plaintiff owes a duty of care to the defendant to proceed with the auction promptly and expeditiously and mitigate the loss so as to reduce the interest and the late payment interest imposed against the defendant. The plaintiff should not claim for something they ought to have done but had not done or by reason of their non performance of their own obligation or in breach of their obligation to the defendant, ie, to mitigate the loss, being the claim for the interest and the late payment interest. If the enforcement of the security or the auction has been delayed on account of the merger, the plaintiff has a duty to minimise the effect of the delay. In the present case, the defendant has been able to show that the plaintiff had acted unfairly and unreasonably. The defendant has also been able to show that the claim for the interest and the late payment interest during the period of the delay, being about five years, did not arise naturally or in the usual course of things or such as was reasonably or supposedly to have been in the contemplation of the parties at the time they had entered into the said loan agreement on 10 October 1996. Admission or to condone such a delay could potentially open the 'floodgates' of liability by an indolent claimant who will have total disregard to the duty to mitigate the loss which could have been avoided had reasonable steps been taken to mitigate the loss.

Arthur T Vanderbilt, Chief Justice of The New Jersey Supreme Court (1954-55) 28 ALJ 561 said at p. 562:

> Judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the court-room; Judges deeply versed in the mysteries of human nature and adept in the discovery of the truth in the

A discordant testimony of fallible human beings; Judges beholden to no man, independent and honest and - equally important -- believed by all men to be independent and honest; Judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman and child that may come before them and to preserve individual freedom against any aggression of Government; Judges with the humility born of wisdom, patient and untiring in the search of truth, and keenly conscious of the evils arising in a workaday world from any unnecessary delay.

[26] In the present case, this court is satisfied that this a proper case for this court to interfere with the claim for the interest on the monthly rest and the late payment interest imposed upon the defendant for the period between the expiry of the date as stipulated in the said notice of demand dated 15 November 2001 till 27 November 2006 the first date the first auction was aborted after having taken into account all the circumstances of the case up to the time of the first auction which was held on 27 November 2006. It is most unfair to impose upon the defendant the interest and the late payment interest for the period from the expiry of the date stipulated in the notice of demand dated 15 November 2001 which had granted the defendant one month to settle the balance amount due where the reasons advanced by the plaintiff for the delay is personal in nature to the plaintiff and unacceptable as a period of about five years is too long a period to have not proceeded with the auction. The claim for the interest and the late payment interest for the five years is unfair and improper. Accordingly, there could be no justification for allowing the plaintiff to impose the interest and the late payment interest against the defendant for the period of about five years. The fact that the plaintiff is at liberty to proceed with the auction within 12 years under the Limitation Act 1953 to enforce the statutory remedy does not mean the plaintiff can sleep on its right and wake up at their convenience and leisure and proceed with the auction only on 27 November 2006, particularly when the delay would obviously cause unfairness, prejudice and burden on the defendant. As the plaintiff has slept on their right to proceed with the auction timeously, they must be prepared to forego the interest and the late payment interest during the said period.

Convenience and justice are often not on speaking terms. (per Lord Atkin in *General Council on Medical Education of the United Kingdom v. Spackman* [1943] 2 All ER 389 at p. 341)

Convenience and justice generally have never been on speaking terms with each other. Justice ought not to be scarified at the altar of convenience (see *Abdul Majid v. Disciplinary Committees of the University of the Panjab* PLD 1970 Lahore 416)

[27] In deciding the two questions framed, this court must be able to take into consideration the intention of the parties when the contract was made, the contemplation of the parties in the event of a breach and the conduct in all the surrounding circumstances. In essence, this court must be persuaded that the plaintiff has in fact proceeded with the auction within a reasonable period from the due date or from the date of the breach. As stated above, there is certainly a prolong delay on the part of the plaintiff in proceeding with the auction and that delay has caused prejudice, injustice and unreasonable burden to the defendant. Therefore, the defendant must be compensated adequately by deducting the interest and the late payment interest which had accrued during the said period of the delay.

1. In *Chan Boi Loi v Public Bank Berhad & Another application* [2011] 1 MLJ 478 referred to by the learned council for the plaintiff, the main argument on the applicant's behalf *inter alia* was that, on its true construction, the terms of the Annexure to the charge document had precluded the bank from bringing an action from the covenant to repay the loan until the property has been sold off and only then in the event of a short fall, the bank could file a civil action to recover the short fall.

2. In that case, the bank had commenced an action against the applicant on their personal covenant before proceeding under the charge. It was argued that the bank was not entitled to do so. The applicant has resisted the bank's action at the High Court. The High Court had agreed with the applicant's contention on that ground and dismissed the action filed by the bank. The bank appealed to the Court of Appeal. By a majority, the Court of Appeal allowed the appeal and reinstated the suit.

3. The Applicant filed an application at the Federal Court for leave to appeal. In that case, in addition to the said issue raised by the applicant, there were also other legal issues which were addressed by the Federal Court namely, that a

A lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successfully to recover the money lent unless there is an agreement to the contrary and such an agreement is not to be implied from a clause in an Annexure to a charge as in that case.

B 4. In other words, the Federal Court ruled that it was not an agreement by the bank to postpone its right to bring an action *in personam* for the recovery of the whole sum lent (together with the interest) until after the charge land has been sold. The Federal Court further held that there were C two contracts of loan and the two letters of offer dated 18.6.1982, the terms of which was accepted by the borrowers. The letters contained terms that are not to be found in the respective annexure. One contract was in respect of an overdraft and the other was for a term loan.

D 5. Therefore, the Federal Court found that both the contracts stand independently as a separate contract of debt for the breach for which the respondent brought its action as it was indeed entitled to do. Accordingly, the application for leave was dismissed.

E **[28]** In the circumstances, this court is of the respectful view, while the decision of the Federal Court is binding on this court, the factual matrix in that case and the facts and the surrounding circumstances in the present case can be distinguished. In that case, there was no issue of the delay and the reasons for the F delay in proceeding with the auction and it does not apply to the factual matrix in the present case. In that case, the main contention of the applicant was that the bank was precluded in proceeding with the civil action to recover the debt until it had sold off the charge land and only then in the event of a short fall, G the bank could commence an action against the applicant to recover the short fall which is not the same in the present case. Therefore, with respect, the facts and the decision in that case does not assist the plaintiff to circumvent or overcome the unreasonable delay and failure to mitigate the loss, being the H interest and the late payment interest which had accrued during the period of the said delay.

[29] On the totality of the factual matrix in the present case, this court must answer Question No. 1 in the affirmative and Question I No. 2 in the negative. The interest and the late payment interest claimed as penalty interest for the late payment and other chargers

which the plaintiff has claimed or has included in the sum of RM496,650.32 for the said period is disallowed. Accordingly, the Registrar of the High Court is directed to assess the total amount due, less the deduction for the interest, the late payment interest and other chargers and the exact period of the delay by the plaintiff ie, from the expiry of the time stipulated in the notice of demand dated 15 November 2001 till the date of the first auction on 27 November 2006 which was aborted. Therefore, the claim of RM496,650.32 as at 30 September 2010 as claimed in prayer (a) is disallowed and is to be amended as assessed by the Registrar of the High Court. The interest and the late payment interest as per prayers (b) and (c) is disallowed and is to be amended as assessed by the Registrar. In order to assist the Registrar to arrive at a just decision in accordance with the decision of this court, both the parties are directed to file an affidavit with the details to reflect the amount due, namely, the principle sum, the interest as claimed in prayer (b), and the late payment interest as claimed in prayer (c) the amount credited from the proceeds of the sale of the property, less the amount which has been disallowed by this court for the said period and to submit within two weeks from the date of this order to the Registrar of the High Court, on or before 21 May 2012. Accordingly, judgement is given in favour of the plaintiff for the defendant to settle the outstanding sum as assessed by the Registrar. The date for the case management before the Registrar is fixed on 28 May 2012.